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No. 92-1902

In the Supreme Court of the United States

OCTOBER TERM, 1993

VIENNA MORTGAGE CORPORATION, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
AS RECEIVER FOR NATIONAL BANK OF WASHINGTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Federal Deposit Insurance Corporation, in its capacity as receiver, is subject to a written agreement that the predecessor financial institution did not execute.

2. Whether petitioner's counterclaim against the Federal Deposit Insurance Corporation properly was dismissed based on petitioner's failure to exhaust its administrative remedies in accordance with 12 U.S.C. 1821(d) (Supp. III 1991).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is unreported, but the judgment is noted at 985 F.2d 553 (Table). The orders of the district court (Pet. App. B1, B2) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1993. A petition for rehearing was denied on March 2, 1993. Pet. App. C1-C2. The petition for a writ of certiorari was filed on May 26, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On April 7, 1988, petitioner (then known as the Washington Mortgage Group) and the National Bank of Washington entered into a Whole Loan Sale and Servicing Agreement (Servicing Agreement). Under the Servicing Agreement, petitioner made real estate mortgage loans, which the bank purchased. Petitioner serviced the loans in return for a fee. The bank had the right to terminate the Servicing Agreement without cause on 30 days' notice, without any further obligation to petitioner. The Servicing Agreement also provided that it could not "be modified in any respect except by an amendment in writing signed by both parties." At the time the Servicing Agreement was signed, both petitioner and the bank were subsidiaries of Washington BanCorporation, a Delaware bank holding company. See Pet. App. A3.

On May 19, 1990, the holding company entered into a Stock Purchase and Investment Agreement with Washington Mortgage Acquisition, Inc. (WMA), in which the holding company agreed to sell all of petitioner's stock to WMA. The terms of that document provided that petitioner would continue to service mortgages held by the holding company and its subsidiaries. When the transaction closed on June 29, 1990, petitioner and the holding company executed a document styled "Amendment To Whole Loan Sale and Servicing Agreement," which purported to amend the Servicing Agreement between petitioner and the bank to provide for a substantial termination fee if the bank terminated the Servicing Agreement without cause. Although the document identified "WASHINGTON BANCORPORATION * * * and its

subsidiaries" as the "Purchaser," the signature lines did not provide for execution by the bank. The minutes of the meetings held by the bank's board of directors do not reflect approval of the document by the bank. C.A. App. 59, 63, 120-122, 242-306, 310-414; see Pet. App A4.

On August 10, 1990, the government declared the bank insolvent and appointed the Federal Deposit Insurance Corporation (FDIC) as receiver for the bank. On October 25, 1990, the FDIC gave petitioner 30 days' notice of its intention to terminate the Servicing Agreement between petitioner and the bank. Petitioner responded by turning over funds in its possession, as required by the agreement, except that it retained about $770,000 as a termination fee based on the terms of the Amendment executed by petitioner and the holding company. See Pet. App. A4-A5.

2. On August 2, 1991, the FDIC instituted this action against petitioner in the United States District Court for the Eastern District of Virginia, seeking to recover damages in an amount equal to petitioner's termination fee. Petitioner filed a counterclaim asserting that it was entitled to the termination fee under the Amendment; that the FDIC's attempt to deprive petitioner of its termination fee constituted a breach of contract; and that allowing the FDIC to void the Amendment while retaining the consideration for the Amendment would enrich the FDIC unjustly. Pet. App. A5.

The district court disposed of the substantive issues in the case in two brief orders. First, the court dismissed petitioner's counterclaim without prejudice "based upon [petitioner's] failure to exhaust

the appropriate administrative procedures." Pet. App. B1. Second, the court granted the FDIC's motion for summary judgment based on its conclusions that the Amendment "is an agreement within the meaning of 12 U.S.C. § 1823(e), and that the agreement is not valid against the [FDIC] because the provisions of 12 U.S.C. § 1823(e) were not complied with." Pet. App. B2.

3. The court of appeals affirmed. Pet. App. A1-A10. On the FDIC's claim, the court explained that 12 U.S.C. 1823(e) (Supp. III 1991) bars enforcement of any "agreement" that "tends to diminish" the FDIC's interest in any "asset," unless the agreement is signed by the failed institution and approved by the board of directors or its loan committee. Because the Amendment did not meet those requirements, it could not be valid against the FDIC. Pet. App. A5-A7. The court also affirmed the district court's conclusion that petitioner's counterclaim should be dismissed based on petitioner's failure to exhaust its administrative remedies as required by Section 1821(d). The court rejected petitioner's argument that it would have been futile to pursue the claim administratively. Pet. App. A8-A10.

ARGUMENT

1. Petitioner argues (Pet. 15-27) that the lower court erred in dismissing petitioner's claim under the Amendment to the Servicing Agreement as barred by 12 U.S.C. 1823(e) (Supp. III 1991). That argument cannot be reconciled with the language of the statute. Section 1823(e) provides broadly that "[n]o agreement which tends to diminish * * * the interest of the [FDIC] in any asset acquired by it * * * as receiver of

any insured depository institution, shall be valid against the Corporation" unless specified requirements are met. Because the Amendment plainly is an agreement, and just as plainly would diminish the FDIC's interest in the assets it acquired as receiver for the failed bank, the Amendment cannot be valid against the FDIC unless it meets the requirements of Section 1823(e).

The agreement does not satisfy the requirements of Section 1823(e), because it was not "executed by the depository institution," 12 U.S.C. 1823(e)(2) (Supp. III 1991), and because no "approv[al] by the board of directors of the depository institution or its loan committee * * * [is] reflected in the minutes of [the bank's] board or committee," 12 U.S.C. 1823(e)(3) (Supp. III 1991). Accordingly, the lower courts correctly refused to enforce the Amendment against the FDIC as receiver for the failed bank. See, *e.g.*, *RTC* v. *Ruggiero*, 977 F.2d 309, 315 n.6 (7th Cir. 1992) (document signed by borrower but not lender cannot bind RTC as receiver); *Twin Construction, Inc.* v. *Boca Raton, Inc.*, 925 F.2d 378, 383-384 (11th Cir. 1991) (document in files of failed institution does not bind receiver because it was not signed by institution).*

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* Petitioner errs in asserting that the decision conflicts with decisions of the Seventh and Eleventh Circuits. See Pet. 18-20 (citing *Howell* v. *Continental Credit Corp.*, 655 F.2d 743, 746-747 (7th Cir. 1981); *FDIC* v. *Merchants National Bank*, 725 F.2d 634, 639 (11th Cir.), cert. denied, 469 U.S. 829 (1984)). *Howell* involved a "bilateral" agreement (that is, an agreement executed by the parties sought to be bound), 655 F.2d at 747, and the only apparent relevance of *Merchants* is that it cited *Howell*'s discussion of the enforceability of bilateral agreements, 725 F.2d at 639.

dence Joint Venture v. *FSLIC*, 489 U.S. 561, 579 (1989); *Weinberger* v. *Salfi*, 422 U.S. 749, 765-766 (1975); *FDIC* v. *Shain, Schaffer & Rafanello*, 944 F.2d 129, 136 (3d Cir. 1991); see also *Rosa*, 938 F.2d at 395 (declining to decide if exhaustion is always required because no basis for forgiving failure to exhaust in that case). In any event, both of the lower courts concluded that petitioner had failed to establish that resort to the administrative process would be futile, and petitioner offers no basis for supposing that it would be useful for this Court to review that conclusion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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